AERO MANUFACTURING SDN BHD *a*

v.

KESATUAN KEBANGSAAN PEKERJA-PEKERJA SYARIKAT-SYARIKAT PEMBUATAN KELUARAN GETAH & ANOR

b

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[ORIGINATING SUMMONS NO: R1-25-89-98]
11 SEPTEMBER 2000

LABOUR LAW: *Industrial Court - Award - Award in relation to salary structure of employees - Errors in finding - Breach of s. 30(4) Industrial Relations Act 1967 - Whether certiorari should issue* *c*

The applicant company and the 1st respondent, the union representing the applicant's employees, could not come to an amicable settlement over the salary structure of the employees concerned. The 2nd respondent, *ie*, the Industrial Court, made an award in respect of that salary structure which was less than what the 1st respondent had asked for and more than what the applicant had proposed. *d*

The applicant now applied for an order of *certiorari* to quash the award of the Industrial Court in relation to the said salary structure. The applicant claimed that the Industrial Court erred in stating that the employees of the applicant were transferred to another company when in fact the employees had seconded. It was also claimed that the Industrial Court erred in holding that that other company should pay for the increase in the salaries concerned. *e* *f*

Held:

[1] The Industrial Court erred in law when it equated a secondment of the employees with that of a transfer of the employees and concluded that the employees seconded were the employees of that other company. The other company was not a party to the proceedings in the Industrial Court and could not be made liable when it had no opportunity to speak for itself in the proceedings. Also, there was no evidence that the other company could pay for the salaries concerned. *g*

[2] The Industrial Court failed to consider the financial incapacity of the applicant to pay for the increase in the salaries concerned. Further, its failure to take into account the financial crisis faced by the country during the relevent period was a breach of s. 30(4) of the Industrial Relations Act 1967. *h*

[Award in relation to salary structure quashed and remitted to Industrial Court for re-consideration.] *i*

Case(s) referred to:
Aero Manufacturing Sdn Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Syarikat-syarikat Pembuatan Keluaran Getah & Anor [1998] 2 ILR 918 ***(refd)***
Mersing Omnibus Co Sdn Bhd v. Kesatuan Pekerja-pekerja Pengangkutan Semenanjung Malaysia & Anor [1998] 2 CLJ Supp 53 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 30(4)

For the applicant - P Jayasingam; M/s Albar Zulkifly & Yap
For the respondents - Ashok K Raman; M/s Abu Talib Shahrom & Zahari

Reported by Usha Thiagarajah

JUDGMENT

KC Vohrah J:

This is an application for *certiorari* to issue to quash a part of Award 361 of 1998 made by the Industrial Court on 18 July 1998 concerning the wage structure and increase in the wages of employees of the applicant (the company).

The 1st respondent (the union) represents workers of the company who are eligible for membership of the union for collective bargaining purposes.

The union had served the company its proposal for the first collective agreement. As the parties had failed to reach amicable settlement on the collective agreement the Minister referred the matter to the Industrial Court.

When the matter came up for the hearing on the merits the parties informed the court that they had come to an amicable settlement on all articles of the agreement save for the article on salary, art. 21, which deals with the minimum and maximum salaries of various employees under particular job titles and their annual increments.

The company made a proposal for the wage structure for the workmen in accordance with their job titles and there was a counter proposal from the union with higher amounts to be paid to workmen in each job title. The Industrial Court then made an award in respect of this wage structure which was less than what the union had asked for and substantially more than what the company had proposed. The Industrial Court also made a finding that the employees of the company had been transferred to another company and it would appear that the assumption is that this other company could pay the increases awarded by the Industrial Court.

The company's complaint before the court is that the Industrial Court when making the award as regards the wage structure had erred in law by taking

irrelevant considerations into account and by ignoring relevant matters including s. 30(4) of the Industrial Relations Act 1967 and had come to a conclusion which no other tribunal could have reasonably come to. As part of the complaint the company also contended that when the Industrial Court stated that the employees of the company had been 'transferred" to another company and could pay the increase, this was in error as the evidence showed the employees had been seconded to that other company and in any event the other company was not a party to the proceedings and could not have been made liable to pay the increase in the wages.

As stated earlier, at the final stage of the hearing the terms and conditions of the collective agreement had been amicably settled upon save for the sticky issue of the wage structure under art. 21.

The company made the following proposal for the wage structure –

Category	**Minimum Salary (Year 1)**	**Maximum Salary (Year 20)**
Boilerman	RM600	RM1,900
Supervisor	RM600	RM1,900
Asst. Supervisor	RM600	RM1,900
Asst. Storekeeper	RM600	RM1,900
Chargehand	RM550	RM1,500
Leadinghand	RM500	RM1,450
General Workers	RM468	RM1,000
Yearly Increment	- 6% last-drawn basic salary.	

The union agreed to the 6% yearly increment on the last drawn basic salary but countered with a different proposal for the salary scales

Job Category/Title	**Minimum Salary**	**Maximum Salary**
Boilerman	RM1,200	RM2,500
(a) First Grade (b) 2nd Grade	RM 600	RM1,900
Supervisor	RM 900	RM2,400
Asst. Supervisor	RM 800	RM2,100
Chargehand	RM 650	RM1,800
Leading hand	RM 600	RM1,500
Production General Worker	RM550	RM1,300

The Industrial Court in its award, in a general statement, considered that the union's proposal was reasonable in particular the salary scale for boilerman first grade but that the company's offer of a minimum salary of RM600 was far too low, boilerman being very scarce commodity in the market. The Industrial Court observed that the union's proposals in respect of the other categories of employees were also reasonable and accepted them. But it considered the maximum salaries asked for by the union as being a little too high and accordingly reduced them.

This is the award made by the Industrial Court (after accepting the annual increment to be 6% on the last drawn basic salary as proposed by the company and as accepted by the union) –

JOB TITLES & SALARY SCALES

Job Category/Title	Minimum Salary	Maximum Salary
Boilerman	RM1,200	RM2,500
(a) First Grade		
(b) 2nd Grade	RM600	RM1,900
Supervisor	RM900	RM2,000
Asst. Supervisor	RM800	RM1,900
Chargehand	RM650	RM1,600
Leading hand	RM600	RM1,500
Production General Worker	RM550	RM1,200

The Industrial Court then gave specific reasons to as why the court came to the wage structure that it awarded. One of the reasons given is difficult to understand. I have read and re-read the reasoning given to see if there is a misunderstanding in what the Industrial Court had meant. I fear that indeed it is what counsel for the company had argued the Industrial Court had meant – that the Industrial Court was of the view that because the workers had been "transferred" from the company (which was making losses) to another company, then that other company could pay the increases on the salaries. This was what the Industrial Court stated:

> In considering salary revision to be granted the Court could not accept the Company's submission that the Company has no financial capacity to pay by showing that the company no longer had any business and that it had suffered losses. This is on the ground that the company no longer employed the workers and they had been transferred to another Company. It is the Company that

> actually employed the employees that needs to be examined. In the absence of any evidence produced by the Company (the) Court has to assume that the Company that actually employed the employees would have the financial capacity to pay the salary revision to be awarded by the Court. The Company that is before the Court had not submitted that the Company that employs the employees is incapable of paying whatever increase the Court may award.

The passage I have quoted has to be viewed in the context of another passage where it is shown that the court was aware that the company had "seconded" (not "transferred") its 17 staff to the other company and that the company had produced its audited accounts ending 1996 and 1997 which showed accumulated losses. That passage reads:

> Learned counsel submitted that the Court should not allow any salary revision across the board. He cited financial incapacity. The Company had in fact ceased to do business. It used to supply the Ministry of Defence certain products. However with effect from 28th July 1995 the company had been blacklisted by the Government for 5 years. As a result of the cessation of business the Company had seconded its 17 staff to another Company Aeroform Industries Sdn. Bhd. This Company is owned by the same shareholders of the Company before the Court. Learned counsel produced the audited accounts of the Company ending 30th June 1996 and 1997.
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> The accounts show that the Company had accumulated loss of RM590,460 on 30th June 1996 and RM1.875 million on 30th June 1997. He also informed the Court that the Directors of the Company had taken a 50% reduction in their fees.

How the Industrial Court (in the earlier passage which I reproduced) could say that the company had "transferred" its staff to another company is puzzling. The Industrial Court had mentioned the production of the 1996 and 1997 accounts showing that the company had accumulated losses of RM590,469 and RM1.875 million for 30 June 1996 and 30 June 1997 respectively. It is clear that the Industrial Court in the earlier passage, when it made the reference that "the company before the court had not submitted that the company that employs the employees is incapable of paying whatever increase the court may award", had meant there was no proof before the Industrial Court that the **other** company to which the applicant company had seconded (not "transferred) its 17 staff did not have the financial capacity to pay.

The Industrial Court clearly erred in law when it equated a secondment of the staff with a transfer of the staff making the court come to the conclusion, a wrong conclusion, that the employees concerned were the employees of the other company and that this other company was the real employer. This other company was not a party to the proceedings in the Industrial Court and I fail

to see how this other company can be made liable to pay for the increase on the wage increases when it had no opportunity to speak for itself in the proceedings and there was no evidence that this other company could pay for the increase.

Even assuming the wage structure was made in relation to the applicant, the Industrial Court failed to take into account various documentary exhibits which were tendered before it which showed that the company had no financial capacity to pay – the court spoke of the accounts showing accumulated losses of RM590,469 and RM1.875 million in its audited accounts for June 1996 and June 1997 respectively – yet did not take these losses into account when making the award which was considerably higher than what the company had proposed and my view is that the court's decision was influenced by the fact that the other company which was making use of the services of the company's employees (on secondment) had been assisting in the payment of the salaries of the employees of the company.

In regard to the well known fact that the country was facing an economic downturn during the relevant period the Industrial Court had this to say:

> The court is well aware of the economic situation of the country. However, the present economic situation has also caused an increase in the cost of living. If salaries are not revised to meet the increase in the cost of living the standard of living of the workers would drop.

This statement showed that the Industrial Court had failed to consider and to look into the financial incapacity to pay the large increases in salary given in its award and its failure to take into account the financial crisis faced by the country as a whole, only taking into account the increase in the cost of living experienced by the members of the union. This is in breach of s. 30(4) of the Industrial Relations Act 1967 which reads as follows:

> 30. (1) ...
>
> (4) In making its award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.

There are several matters in s. 30(4) to consider and they should all have been taken into account when the Industrial Court made its award. And failure to do so is an error of law which justifies this court in quashing that part of the award relating to salary structure and increase in wages.

In connection with this it is pertinent to bear in mind the case of *Mersing Omnibus Co Sdn Bhd v. Kesatuan Pekerja-pekerja Pengangkutan Semenanjung Malaysia & Anor* [1998] 2 CLJ Supp 53 where the importance of taking into account the said provision s. 30(4), was stressed and that the failure to adhere to its provisions renders an impugned award erroneous in law. At pp. 58 and 59 His Lordship Nik Hashim J had this to say:

> ... the issue of financial incapacity is sufficiently raised ... Therefore, the question of whether the company has the capacity to pay is relevant. It is a question of fact for the Industrial court ... .
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> The finding of the Industrial court that the increase was needed in order to keep up with the level of wages in similar companies and to offset the increase in the cost of living, even if taken to mean that the Industrial Court had taken into account the third element of s. 30(4), without regard to the other two, *ie*, public interest and the financial implications of the company to meet the claims, to my mind, is still insufficient to satisfy the requirements of s. 30(4). Since the disputed award was founded in and mandatory provision of s. 30(4). the award given is arbitrary and erroneous not made in accordance with law

Bearing in mind the indefensible position that the Industrial Court took in relation to making a company other than the applicant company in effect responsible for the increases in the wages structure and that it ignored evidence of the financial incapacity of the company and therefore did not take into account the full impact of the mandatory provision of s. 30(4) of the Act, the Industrial Court had come to an award in relation to the wage structure under art. 21 of the collective agreement which was clearly unreasonable. It ought to be quashed.

The award in so far as it relates to the wage structure is quashed and remitted to the Industrial Court for re-consideration.

Costs to the applicant company.